In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1546

JOSEPH STAPLETON, Treasurer of the County of Hudson, and the COUNTY OF HUDSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 5a-30a) is reported at 454 F. 2d 1210. The opinion of the district court (Pet. App. B, 31a-38a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1972, and the petition for rehearing was denied February 28, 1972 (Pet. App. A, 1a-4a). The petition for a writ of certiorari was filed on May 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly held that the district court lacked jurisdiction over an action, removed from a state court, involving title to property in which the United States claims an interest.

2. Whether petitioners failed to establish that $2,438,110 found by workmen in a garage and deposited in the United States Treasury in partial satisfaction of liens for unpaid taxes, had previously been forfeited to them under applicable state law.

STATUTES INVOLVED

The pertinent provisions of 26 U.S.C. 6321, 6322, and 7426, 28 U.S.C. 1442 and 2006, and N.J.S.A. 2A:152-6 and 152-7, are set forth at Pet. 4-6 and Pet. App. E, 73a-78a.

STATEMENT

On July 3, 1962, some workmen were renovating private garages in Jersey City, New Jersey, when they discovered $2,438,110 in the trunk of an old automobile parked in one of the garages. Various

other articles pertaining to Joseph V. Moriarty [1] were also found in the garage. The Federal Bureau of Investigation was called to the scene, and agents from that department took initial control of the money. On July 5, 1962, the District Director of Internal Revenue made a jeopardy assessment against Moriarty for income tax and interest due in the amount of $3,395,655.33. On July 9, 1962, the government's notice of lien was filed in the Hudson County Register's Office and a notice of levy was served on the United States Marshal who had custody of the currency. On July 16, 1962, the money was turned over to the Internal Revenue Service by the United States Marshal and deposited in the National State Bank of Newark, New Jersey, which is the depository for internal revenue collections for New Jersey. Within twenty-four hours the funds were credited to the account of the Secretary of the Treasury in the Federal Reserve Bank of New York. (Pet. App. A, 6a.)

On September 24, 1962, petitioners filed a complaint in the Superior Court of New Jersey, Law Division, Hudson County, seeking a judgment that the money be forfeited to the County of Hudson, by reason of its being contraband, pursuant to N.J.S.A. 2A:152-9. The complaint named Chris L. Gross, the District Director of Internal Revenue, as one of the claimants to the fund. On October 16, 1962, Mr.

[1] Joseph V. Moriarty has never claimed the $2,438,110. He was the head of a "numbers racket" operating in Jersey City (Pet. App. B, 32a).

Gross filed a petition for removal in the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. 1442(a)(1), on the ground that the proceeding in the state court was an action commenced against an officer of the United States for an act performed under color of office. The suit was removed to the district court where the defendant moved to dismiss, claiming that the court lacked jurisdiction. Thereafter, on February 17, 1964, petitioners filed a supplemental complaint and subsequently filed amendments to that supplemental complaint, one of which added the United States as a party defendant. (Pet. App. A, 6a-8a; Pet. App. G, 90a-109a.)

The district court asserted jurisdiction and, relying upon a state statutory presumption, held that the funds were forfeited to petitioners prior to the effective date of the tax lien (Pet. App. B, 31a-38a). The court of appeals reversed, holding that since the state court had lacked jurisdiction over the petitioners' suit, the district court was without jurisdiction upon removal. Judge McLaughlin's opinion for the court further stated that in the circumstances here the presumption relied upon by the district court was unavailable and that forfeiture under applicable state law would have occurred only if "the money was an implement or device made or used for the purpose of gambling" and that petitioners had failed to offer such proof (Pet. App. A, 15a). Judge Adams, concurring, agreed that the district court was without jurisdiction but stated that if jurisdiction were pres-

ent he would have remanded the case to the district court for determination whether in fact the money had been used in a gambling operation (Pet. App. A, 20a-30a). Judge Ganey concurred in the result of the court's opinion and with Judge Adams' concurrence (Pet. App. A, 20a).

ARGUMENT

1. Petitioners contend (Pet. 13-26) that the district court had jurisdiction on removal on the ground that the state court from which the action was removed had jurisdiction.[2]

The instant action involves title to property in which the United States claims an interest. As the court of appeals properly stated (Pet. App. A, 12a), such an action "is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court." See *Dugan* v. *Rank*, 372 U.S. 609, 619-626; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687. The United States has

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[2] Petitioners also assert (Pet. 22-24) that the decision of the court of appeals below conflicts with *Johnston* v. *Earle*, 245 F. 2d 793 (C.A. 9). That case involved an action brought in federal court against two Internal Revenue officers for the alleged tortious seizure and conversion *to their own use* of plaintiff's property. In holding that the district court lacked jurisdiction over a suit against Federal officers acting without authority, the court of appeals noted that the suit would be cognizable in a state court. In contrast, in this case money was seized by officers acting within their authority and it is the United States, not the officers in their personal capacities, which claims an interest in the property. The asserted conflict therefore does not exist.

consented to such suits in state courts only in the narrow circumstances described in 28 U.S.C. 2410, and petitioners do not contend that jurisdiction in this case can be based on that statute; other state court action with respect to property taken or detained under the federal revenue laws is expressly prohibited by 28 U.S.C. 2463. See *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404, 408-409. Thus the state court lacked jurisdiction over petitioners' suit.[3] Accordingly the district court also was without jurisdiction.[4] As this Court stated in *Minnesota* v. *United States*, 305 U.S. 382, at 389:

> If Congress did not grant permission to bring this * * * proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court on

[3] Although petitioners concede (Pet. 15) that their action was originally filed as an *in rem* proceeding, they argue (Pet. 17-21) that it was in fact against the District Director in his official capacity and that the state court therefore had *in personam* jurisdiction. This amounts in effect to the untenable assertion that the sovereign immunity of the United States against unconsented suits in state courts may be overcome by the simple expedient of naming as defendant a government officer in his official capacity rather than the United States. This argument was rejected by this Court in *Dugan* v. *Rank*, *supra*. See also *In re Escheat of Monies Deposited in U.S. Dist. Ct.*, 187 F. 2d 131, 135, n. 13. Petitioners cite no authority for their novel proposition and apparently rely upon the government's failure to raise jurisdictional objections in two taxpayer suits brought in state courts during the nineteenth century.

[4] Objection to the district court's lack of jurisdiction was timely made in that court. Cf. *Grubbs* v. *General Electric Credit Corp.*, No. 71-257, O.T. 1971, decided April 18, 1972.

> removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 383; *General Investment Co.* v. *Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 288.[5]

And as Mr. Justice Frankfurter has pointed out, "[t]he derivative nature of removal jurisdiction * * * is not based upon technical rules of law" but instead serves the legitimate purpose in our federal system of permitting a defendant "to transfer the suit to a neutral federal court without losing or gaining any privileges by such transfer." *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 462 (dissenting opinion).

2. In addition to the district court's lack of jurisdiction, there is an additional independent reason supporting the result reached by the court of appeals. Petitioners, having the burden of proof, did not establish the necessary factual elements required for forfeiture under New Jersey law.

The State of New Jersey has two basic statutes

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[5] This long-standing doctrine of derivative jurisdiction renders irrelevant petitioners' claim (Pet. 24-26) that 26 U.S.C. 7426 would have conferred upon the district court original jurisdiction. Nevertheless, that statute was enacted several years after removal of this case to the district court (Section 110(a) of the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1142) and was not intended to apply retroactively. See H. Rep. No. 1884, 89th Cong., 2d Sess. 81-82; S. Rep. No. 1708, 89th Cong., 2d Sess. 35-36.

providing for the forfeiture of property used for gambling purposes, N.J.S.A. 2A:152-6 and 152-7. Under the second statute, moneys seized in connection with an arrest are "deemed prima facie to be contraband of law as a gambling device." That statute, as the court of appeals observed (Pet. App. A, 26a-28a), is not applicable under the facts of the instant case where the moneys were seized by federal officers not in connection with any arrest. Therefore, contrary to petitioners' contention (Pet. 28-33), *Farley* v. *$168,400.97*, 55 N.J. 31, 259 A. 2d 201, which involved the presumption of N.J.S.A. 2A:152-7, does not govern this case.

Since the factual prerequisites for application of the statutory presumption are not present (nor do petitioners contend otherwise), petitioners rely on N.J.S.A. 2A:152-6, which requires, for forfeiture, that petitioners prove that the money to be forfeited was used for the purpose of gambling. Petitioners failed to make the requisite showing. As the court of appeals stated (Pet. App. A, 16a), there was no "legitimate evidence" that the funds in issue were the result of or used in a gambling operation. The money was accidentally found by workmen in a garage with personal belongings of Joseph Moriarty. There was nothing taken from the garage which was less than six years old at the time of the discovery, and most of the material was over 10 years old. There was no gambling paraphernalia in the garage. Moreover, the New Jersey statute of limitations on forfeitures, N.J.S.A. 2A:14-10, reveals a legislative

intention that property be forfeited only on a showing that it has been used in the conduct of a specific illegal act within one year prior to the commencement of the action.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972.

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